No. 436

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

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INDEX

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The Solicitor General, on behalf of the Administrator of the Wage and Hour Division, requests that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Fifth Circuit, entered July 22, 1943, reversing and remanding the decision of the United States District Court for the Eastern District of Louisiana.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 30–37) are reported in 49

F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 47–52) is not yet officially reported, but is printed in 6 Wage Hour Rept. 743.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 22, 1943 (R. 53). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Does the definition of "goods" in Section 3 (i) of the Fair Labor Standards Act, which excludes from its scope "goods after their delivery into the actual physical possession of the ultimate consumer," exempt from the coverage of the Act the handling, packing, and hauling of produce prior to its delivery to ocean-going ships for consumption during voyages.

2. Was the Circuit Court of Appeals warranted in reversing the District Court's finding that there was a continuous movement in interstate commerce of out-of-State goods through defendant's place of business to its customers.

3. Are employees engaged in sorting, selecting, repackaging, and otherwise handling merchandise destined for interstate shipment engaged in the production of goods for commerce within the meaning of the definition of production in Section 3 (j) of the Act, which includes "handling

* * * or in any other manner working on such goods."

4. Where employees' activities relate indiscriminately to interstate and intrastate business, is it proper in determining whether they are entitled to the benefits of the Act, to measure the substantiality of each employee's interstate activities by dividing the proportion of the employer's business which is interstate by the total number of his employees.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT

On January 23, 1942, the Administrator filed a complaint (R. 2–8) against James V. Reuter, Incorporated, alleging that the employer had failed to pay many of its employees engaged in interstate commerce in accordance with Sections 6 and 7 of the Fair Labor Standards Act and had otherwise violated the Act. Among other things, respondent's answer (R. 28–29) denied that it was engaged in interstate commerce.

The facts as found by the District Court may be summarized as follows:[1] Respondent, a

[1] The record on appeal did not include the transcript of the evidence. The findings of the trial court (R. 30–37), therefore, constitute the only factual evidence in the record.

Louisiana corporation, located in New Orleans, is engaged in handling and distributing at wholesale fresh vegetables and fruits (R. 30). Approximately 50 percent of the produce handled is purchased from out-of-State sources (R. 30). Because of the perishable nature of the goods and respondent's method of handling them, there is a continuity of movement of goods received from out-of-State sources until they reach respondent's customers (R. 35). In general, all goods received from out-of-State sources are received and distributed within a period of one to five days (R. 32). Sales are regularly made to out-of-State customers. For the four years from 1939 through 1942, direct out-of-State sales amounted to $58,278 and equalled 5.3 percent of total sales (R. 31).[2] Respondent also regularly sells and delivers "substantial amounts" of vegetables and produce to ship chandlers who provision boats for ocean-going voyages (R. 32). These goods are sold by respondent with the expectation that they will move outside the State (R. 32, 35).

[2] The proportion of direct out-of-State sales is shown in the following table (R. 31):

	Total	Out-of-State	Percent
1939	$201,829	$11,450	5.7
1940	198,994	15,885	8.0
1941	245,084	12,028	4.9
1942	448,758	18,915	4.2
Total (1939-42)	1,094,665	58,278	5.3

The amounts purchased are usually sufficient to last till the boats reach their next port of call (R. 32).

The produce purchased from other States is usually shipped by railroad (R. 30). The refrigerated cars carrying the goods are switched to a siding approximately one block from respondent's place of business known as the "Reuter Switch" (R. 30–31). All the vegetables and produce arriving from other States are unloaded from the freight cars and brought to respondent's place of business to be uncrated and examined before being sold (R. 31). Respondent's employees unload the produce from the freight cars and truck it to respondent's place of business, where its warehouse employees sort, select, repackage, and otherwise handle the goods without distinction as to their ultimate destinations (R. 31). An average of 12 orders a day are assembled and shipped to out-of-State customers usually by a Railway Express truck which is loaded at respondent's place of business by its employees (R. 31–32). The activities of the warehousemen thus related to the 50 percent of produce received from out-of-State sources, to the more than five percent which was shipped directly to out-of-State purchasers, and to the "substantial amounts" which were sold to ship chandlers. In addition, the warehousemen occasionally unloaded produce from freight cars. (R. 31, 32.)

The District Court held (1) that because of the rapidity in turnover of goods received from out-of-State sources and because of respondent's method of handling them, there was a continuity of movement of such goods from out-of-State to respondent's customers, whether local or distant; that the activities of all of respondent's employees were an integral part of that movement; and that therefore such employees were engaged in commerce within the meaning of the Act (R. 35); (2) that employees engaged in unloading, preparing, and shipping orders to out-of-State customers and to ship chandlers for provisioning of ocean-going vessels were engaged in commerce within the meaning of Sections 6 and 7 of the Act (R. 34); and (3) that employees who, without regard to the final destination thereof, sorted, picked over, packaged, repackaged, and otherwise handled produce, part of which was regularly shipped outside the State, "spent a substantial portion of their time working on such goods which did move outside the State" and were engaged in the production of goods for commerce within the meaning of Section 3 (j) of the Act (R. 34–35). An injunction was issued restraining further violations of the minimum wage, overtime, and record-keeping provisions of the Act (R. 32–33, 36–37).

On appeal, the Circuit Court of Appeals reversed and remanded the case on the grounds (1) that the lower court was in error in ruling that the produce had not come to rest at respondent's premises; (2) that the delivery of goods to ship chandlers or ships for consumption on interstate or foreign journeys was to the "ultimate consumer," and that therefore the preparation, handling, and delivery of such goods were excluded from the Act by Section 3 (i); (3) that interstate sales to the extent of five percent would not suffice to establish coverage in the absence of additional proof that particular employees spent a substantial portion of their time working on these interstate shipments, because if this five percent were equally divided among all employees the fractional percentage of the employer's business performed by each employee would be too trifling to justify injunctive relief; and (4) that the lower court erred in holding that the sorting, repackaging, and handling of goods constituted production of goods for commerce under the Act (R. 47–52).

Judge Holmes dissented on the ground that there was nothing in the record to impugn the lower court's finding "that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken ship-

ment in interstate commerce from without the state through appellant into the hands of its customers," and that, upon this finding, the court correctly ruled "that all of appellant's employees were an integral part of that interstate movement and were therefore engaged in commerce under the Act" (R. 52).

REASONS FOR GRANTING THE WRIT

There are four independent grounds upon which this petition for a writ of certiorari is premised:

1. The court below held that the delivery of produce to a ship destined for interstate journeys was to the "ultimate consumer," and, therefore, the packing, hauling, and delivery of such produce were excluded from the Act by the definition of "goods" contained in Section 3 (i). This interpretation is contrary to the literal language of the section and is in conflict with decisions of other circuits as well as with another decision of the Fifth Circuit itself. *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C. C. A. 4), certiorari denied, 317 U. S. 634; *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C. C. A. 6); *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5).[3] The definition of the term "goods" in Section 3 (i) contains the proviso that it "does not include

[3] These decisions involved the production and delivery of ice to be used on railroad trains during the course of transportation.

goods *after* their delivery into the actual physical possession of the ultimate consumer other than a producer, manufacturer, or processor thereof." (Italics supplied.) Claim to the "ultimate consumer" exemption was rejected in all three decisions cited above on the ground that the exclusionary clause in Section 3 (i) does not apply to the production or the handling of goods prior to their delivery to the ultimate consumer. As stated by the Sixth Circuit, "the exclusion clause in Section 3 (i) is intended to apply to goods which have come into the hands of the ultimate consumer *after* transportation is ended, and after they have been withdrawn from further traffic or sale;" it "exempts the ultimate consumer from the penalty of Section 15 (a) (1), and has no effect in limiting the scope of the Act as to the producers of goods intended for shipment in interstate commerce" (*Chapman* v. *Home Ice Co.*, 136 F. (2d) at 355).

Applying these decisions to the instant case, the exclusion clause might protect the ship owners from the prohibition against transporting "hot goods" (Section 15 (a) (1)), but the exemption does not apply to the producer of the merchandise or the wholesaler handling the goods prior to their delivery to the ships.*

* Thus it seems clear that the decision below is erroneous even if it be assumed that the delivery of produce to ships constitute delivery to the "ultimate consumer," which is by no means clear.

2. The reversal of the District Court's ruling that the commodities purchased out-of-State continued in interstate commerce until they reached respondent's customers involves an interpretation of the Act which we believe is contrary to this Court's decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 and *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572. As Judge Holmes pointed out in his dissent, the District Court "found as a fact that such was the rapidity of movement and the method of handling of goods purchased from outside the state that each such transaction was a continuous and unbroken shipment in interstate commerce from without the state through appellant into the hands of its customers. * * * there is nothing in the record to show that it [this ruling] is untrue as a matter of fact" (R. 52).

The record on appeal contained only the pleadings and the findings and conclusions of the District Court. Respondent, who was the appellant below, did not designate or transmit any portion of the evidence. In *Higgins* v. *Carr Bros. Co.*, which involved a wholesale fruit, produce and grocery business, the decision was affirmed by this Court because there was nothing in the record to support petitioner's claim of "an actual or practical continuity of movement of merchandise from without the state to respondent's regular cus-

tomers within the state," and petitioner had not maintained the burden of showing error in the judgment below. Here, there is nothing in the record to impeach the accuracy of the District Court's finding that there was an actual continuity of movement in this case. The importance of the factual determination of continuity of movement, which this Court stressed in *Higgins* v. *Carr Bros. Co.*, has been disregarded by the court below. See also *Walling* v. *American Stores Co.*, 133 F. (2) 840 (C. C. A. 3) and *Walling* v. *A. H. Phillips, Inc.*, 6 Wage Hour Rept. 699 (D. Mass.) in which the courts, relying upon the *Jacksonville* and *Higgins* decisions, stressed the physical continuity of movement in finding that the interstate journey continued through the warehouse to the local retail stores.

3. The court below held, without discussion of the question, that the sorting, handling, and packaging of goods which are shipped in interstate commerce do not constitute production for commerce within the meaning of the Act. We believe this holding disregards the terms as well as the policy of the Act. It also conflicts with the decision of the Fourth Circuit in *Bracey* v. *Luray*, decided September 16, 1943, 6 Wage Hour Rept. 938. Section 3 (j) provides that "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such em-

ployee was employed in producing, manufacturing, mining, *handling*, transporting, *or in any other manner working on such goods.*" [Italics supplied.] The activities of employees preparing goods for shipment to customers are clearly "handling" and "working on" goods within the statutory language. In *Bracey* v. *Luray, supra*, the court held that the handling of scrap iron which was subsequently sold to shipbuilders constituted production since "'handling' is by express terms included in 'production.'" See also *Fleming* v. *Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 225 (E. D. Ky.), where the court held (pp. 256–257):

> A warehouse is not a producer in the ordinary sense of the word. * * * It is, however, a handler of a product moving in interstate commerce and thereby comes squarely within the definition of "producer" as defined by Section 3 (j).

The view that activities of this character come within the statutory definition of production not only follows the language of the statute, but also carries out the purpose of the Act (Section 2 (a)) to prevent interstate commerce from being employed as "the instrument of competition in the distribution of goods produced under substandard labor conditions." See *United States* v. *Darby*, 312 U. S. 100, 115. Low wages paid for sorting,

packaging, or otherwise handling goods affect the cost of products shipped in interstate commerce, and obviously have the same competitive effect, as low wages paid for the processing or manufacturing of goods.

4. The ruling of the court below on the method of determining whether a substantial amount of an employee's time is spent on interstate business is plainly erroneous and would result in an unwarranted exclusion of numerous employees from the benefits of the Act. The District Court found that, in addition to "substantial amounts" of goods sold to ship chandlers for shipment outside the State, five percent of respondent's sales were to interstate customers (R. 31–32). Respondent's employees worked on all goods indiscriminately without distinction as to their ultimate destination (R. 31). The court below held that, if the functions in connection with interstate sales were equally handled by all the 10–15 employees, the interstate activity of each employee would affect only one-half to one-third of one percent of respondent's business, and "since the Court is not concerned with trifles its injunctive processes would hardly be called forth" (R. 51). The patent fallacy of this reasoning is demonstrated by its application to an employer doing 100 percent interstate business with 1,000 em-

ployees. According to Circuit Judge Waller's reasoning, the interstate activities of each employee would relate to only one-tenth of one percent of the employer's interstate business, and no employee would be subject to the Act. Determination of the applicability of the Act upon the basis of any such calculations would produce a startling result in obvious conflict with its meaning and purpose. The approach of the court below is erroneous also because it stresses the amount of the employer's interstate business "as measured in money," as distinguished from the amount of the employee's time spent in these activities. This conflicts with the rule announced by this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572 and *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and applied by other circuit courts in *Walling* v. *Peoples Packing Co.*, 132 F. (2d) 236 (C. C. A. 10) and *Davis* v. *Goodman Lumber Co.*, 133 F. (2d) 52 (C. C. A. 4).

In the case of most wholesalers distributing some of their merchandise in interstate commerce, as in the case of "most manufacturing businesses shipping their product in interstate commerce" (cf. *United States* v. *Darby*, 312 U. S. 100, 117–118), employees' activities relate indiscriminately to both interstate and intrastate commerce. This Court, in the *Darby* case, recognized that "it

would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces" of goods which later move in interstate commerce where the product is produced "without reference to its ultimate destination," 312 U. S. at 117–118. It is our position in such cases, except where the employer's interstate business is trifling in amount and irregular, that employees working indiscriminately in connection with the interstate and intrastate business are entitled to the benefits of the Act. In the recent decision of the Fourth Circuit in *Guess* v. *Montague*, decided September 16, 1943, 6 Wage Hour Rept. 934, the court held that where interstate and intrastate activities were commingled, employees "have made a prima facie showing entitling them to the protection of the Act * * * by showing the general nature of defendant's business" and that "it is not unreasonable to place [upon the employer] the burden" of producing evidence that certain employees "did not render any service in connection with its interstate business" (p. 935). We believe that this is the practical approach suggested by the decision in the *Darby* case.

CONCLUSION

Each of the above questions is concerned with the test to be applied in determining coverage

under the Fair Labor Standards Act,[5] and is accordingly of general consequence to numbers of employers and employees.[5] The decision below on each question is both clearly erroneous and in conflict with principles approved by other courts. We respectfully request, therefore, that this petition for a writ of certiorari be granted.

Respectfully submitted.

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Solicitor General.

DOUGLAS B. MAGGS,
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OCTOBER 1943.

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[5] Cf. *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 127; *McLeod* v. *Threlkeld*, No. 787, 1942 Term, decided June 7, 1943.

APPENDIX

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C., sec. 201, et seq.).

SEC. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

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